FILED
MAR 25 1998
CLERK

(3)

No. 97-1297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALLEN DEBORD AND DEBRA DEBORD,
INDIVIDUALLY AND AS NEXT FRIENDS
FOR KELLY DEBORD, MINOR,
Petitioners,

VS.

THE BOARD OF EDUCATION OF THE FERGUSON-FLORISSANT SCHOOL DISTRICT, SHIRLEY SALMON, JOYCE DREIMEIER, AND CINDY ORMSBY,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

RECECCA S. STITH*
STEPHEN E. ROTHENBERG
DAYNA F. DECK
Suite One East
6609 Clayton Road
St. Louis, MO 63117
Ph. 314-721-2500
Fax 314-721-0606

Attorneys for Petitioners

* Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

8 pp

REPLY TO RESPONDENTS' RESPONSE TO THE QUESTION PRESENTED

Petitioners' Question Presented is the heart and soul of this case and the very issue on which the Eighth Circuit passed in the decision for which certiorari is sought. Respondents inexplicably contend that the true issue is whether federal law requires a school nurse to administer a prescribed medication to a student when the nurse sincerely believes that doing so would violate her professional ethics, "possibly" subject her to malpractice and when such administration would violate a school district policy. However, neither the Eighth Circuit nor the United States District Court for the Eastern District of Missouri ever passed on the issue of a nurse's right nor rested their respective decisions on such purported right. Once again, the Question Presented, which was fully briefed below and on which the Eighth Circuit passed, is:

> Do Speculative Concerns about Harm to the Student and Liability to School District Personnel Excuse A School District from Its Obligations under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act to Make Reasonable Modifications of Its Policies in Order to Accommodate a Student's Disability?

TABLE OF CONTENTS

Reply to Respondents' Response to the Question Presented i

Table of Contents ii

Table of Authorities iii

Conclusion 4

TABLE OF AUTHORITIES

Cases:	Page(s)
Alexander v. Choate, 469 U.S. 287 (1985)	2,3
Davis v. Francis Howell School District, 1998 U.S. LEXIS 4192 (8th Cir. March 12, 1998)	4
DeShaney v. Winnebago County Dep't of Soc. *Servs.*, 489 U.S. 189 (1989)	1
Doe v. Judicial Nominating Comm'n, 906 F.Supp. 1534 (S.D.Fla. 1995)	3
Guckenberger v. Boston University, 974 F.Supp. 106 (D.Mass. 1997)	3
International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991)	2,3
Irving Independent School District v. Tatro, 104 S.Ct. 3371 (1984)	2
Stillwell v. Kansas City, Mo. Brd. of Police Comm'ners, 872 F.Supp. 682 (W.D.Mo. 1995).	3
United States v. Williams, 504 U.S. 36 (1992)	1
W. B. v. Matula, 67 F.3d 484 (3d Cir. 1995)	2

THE DEBORDS' QUESTION PRESENTED, BRIEFED BELOW AND PASSED UPON BY THE EIGHTH CIRCUIT COURT OF APPEALS, IS APPROPRIATE FOR REVIEW BY THIS COURT

Notwithstanding Respondents' contrary contention, the Eighth Circuit expressly passed upon the issue embodied in the Question Presented -- and did so based on briefing by both Petitioners and Respondents. Even if this issue were not briefed below, and it was, the fact that the Court of Appeals squarely addressed the issue more than suffices to raise it in the Question Presented. *See, e.g. United States v. Williams*, 504 U.S. 36, (1992); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 n. 2 (1989). As this Court made clear in *Williams*, 504 U.S. at 41-42 :

> Our traditional rule . . . precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." . . . . "**It suffices** for our purposes that the **court below passed on the issue presented**[.]" (citations omitted; internal quotation marks omitted)(emphasis added).

The Eighth Circuit most certainly passed on the issue of whether speculative concerns of harm and liability excuse a school district from providing the requested accommodation (here, a high dose of Ritalin). *See Debord v. Board of Education* at A-6, A-8 (reprinted in Petitioners' Appendix B). The DeBord court noted that the school district "expressed motivations of fear of student harm and potential liability" and that such concerns "may be speculative"). Thus, this Court, in keeping with its tradition in certiorari review, may and should consider the Question Presented.

THE *DEBORD* DECISION, THAT INDIVIDUALS WITH DISABILITIES CAN BE DENIED ACCESS TO SERVICES BASED ON SPECULATIVE CONCERNS OF HARM AND LIABILITY, CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

As detailed in Petitioners' opening brief, the Eighth Circuit decision in *DeBord* conflicts with, *inter alia*, *Irving Independent School District v. Tatro*, 104 S.Ct. 3371 (1984); *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); and *Alexander v. Choate*, 469 U.S. 287, (1985). Respondents' argument that *Tatro* is inapposite because it dealt with the non-medical health service of catheterization, rather than the administration of medication (which *Tatro* also discussed), actually **strengthens** the applicability of *Tatro* to the instant case. If, as this Court held in *Tatro*, a school district must provide the risky procedure of catheterization to a student with a disability, then, *a fortiori*, a school district certainly must manage the so-called risks in administering a medication as prescribed to accommodate a student's disability, here, ADHD. *Tatro*, 104 S.Ct. at 3378 n. 12 ("the risks imposed . . . should not prove to be a large burden").[1]

Respondents also attempt to avoid the application of *Johnson Controls*. Yet, the highly instructive and analogous reasoning of *Johnson Controls* cannot be explained away. As with the policy in *DeBord*, which barred medication to those children whose prescribed level of medication exceeds the PDR guideline, the policy at issue in *Johnson Controls* barred fertile women from working in positions where the lead level exceeded the federal guideline. The reasoning of *Johnson Controls* applies with greater force here where there is **no** evidence of harm to the

---

[1] *Tatro* involved the predecessor to the Individuals with Disabilities Education Act ("IDEA"). The IDEA and Title II of the ADA must be construed consistently. *See, e.g.*, W. *B. v. Matula*, 67 F.3d 484 (3d Cir. 1995).

child or children in general from Ritalin -- unlike the defendant's evidence in *Johnson Controls* that women's fetuses may, indeed, be harmed by exposure to high levels of lead. In both cases, an entity is obligated by federal statute not to discriminate regardless of concerns of harm and liability.

The *DeBord* decision further contravenes Supreme Court precedent where, as here, the medication policy indisputably "screens out" otherwise qualified individuals, such as Kelly, because their disabilities require a dose-level that is above the policy's PDR-criterion. Such screening out is, itself, discrimination. "The benefit, itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled[.]" *Alexander v. Choate*, 469 U.S. 287, 301 (1985). "The blanket exclusion of all [children needing above-PDR doses] because of an unfounded fear . . . runs afoul of the individualized assessment required by the ADA." *Stillwell v. KansasCity, Mo. Brd. of Police Comm'ners*, 872 F.Supp. 682, 687 (W.D.Mo. 1995). "[P]ublic entities cannot use eligibility criteria that screen out, or tend to screen out, individuals with disabilities." *Doe v. Judicial Nominating Comm'n*, 906 F.Supp. 1534, 1540 (S.D.Fla. 1995); *see also Guckenberger v. Boston University*, 974 F.Supp. 106, 134-135 (D.Mass. 1997)("This tend-to-screen-out concept . . . makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish an individual's chances of participation").

To discriminate against the level of medication required for adequate treatment of a disability is, itself, discrimination against the disability. By allowing a school district (and other entities) to make policies that "screen out" or render ineligible those individuals, such as Kelly DeBord, whose disabilities require unusually high doses of medication, the Eighth Circuit in *DeBord* has ignored Supreme Court precedent and undermined the purpose of Title II of the ADA and §504.

At least one judge in the Eighth Circuit has now recognized the faulty reasoning of *DeBord*. As Senior Judge Myron Bright noted in an extremely similar case, "[I]f the school administers adequate medication for one child's disability and inadequate medication for another child's similar disability, the **school policy discriminates** (emphasis added)." *Davis v. Francis Howell School District*, 1998 U.S. LEXIS 4192 at *11-12 (8th Cir. March 12, 1998)(Bright, Sr. J., concurring)(although recognizing he was constrained by *DeBord* to concur, Judge Bright voiced his frustration, stating, "I question the rationale that the amount of medication necessary for treatment of ADHD does not relate to a student's disability").

CONCLUSION

The Question Presented is appropriate and the Petition for a Writ of Certiorari should be granted to review the decision below.

Respectfully submitted,

REBECCA S. STITH*
STEPHEN E. ROTHENBERG
DAYNA F. DECK
Attorneys for Petitioners
Suite One East
6609 Clayton Road
St. Louis, MO 63117
Ph. 314-721-2500
Fax 314-721-0606

*Counsel of Record